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Supreme Court of the United States

OCTOBER TERM, 1944

No. 1225

APPROVED DEHYDRATING CO., INC.,
Petitioner,

against

GOLDEN EAGLE FARM PRODUCTS, INC.,
Respondent.

REPLY BRIEF FOR PETITIONER

J. BERTRAM WEGMAN,
Counsel for Petitioner.

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Respondent's Point I

Petitioner recognizes that the refusal of the Trial Court to set aside the verdict in this case, and the affirmance of the judgment by the Circuit Court of Appeals, make it difficult to believe that there was no jury issue. The respondent apparently relies upon that truism to support its statement that the testimony was "directly contradictory as to every material detail of the controversy" (Resp. Br. p. 3).

The statement is simply not true. It is not supported by the respondent's citations to the record, and is controverted by the opinion of the Circuit Court, which found only indirect contradiction (R. 345). In the briefs submitted to the Circuit Court of Appeals, the petitioner's insistence that there had been no contradiction of its evidence showing adulteration of the eggs in suit brought from the respondent no reference to the record to disprove

it. A careful examination of the respondent's record references in its brief in this Court shows none which have any recognizable connection with the claim which they are cited to support. The only references which are at all in point are those at R. 227 and R. 235, which the Court below referred to as assertions "that the sugar could not have been added before the defendant processed" the eggs (R. 345).

But those assertions were not made regarding the liquid eggs in suit. They were made with specific reference to samples of egg powder, processed from eggs previously delivered. That is why the Circuit Court referred to them as contradicting the petitioner's witnesses only "in an indirect manner", and why the petitioner contends that the decision below is contrary to principles heretofore announced as controlling by this Court.[1]

The opinion below plainly intimates the Court's skepticism as to the validity of the rule that the jury must not arbitrarily reject the uncontradicted testimony of a witness (R. 344, marginal note). Its holding that the rule is not involved in the present case because there is indirect contradiction of the testimony, in effect overrides the rule. It is difficult to imagine any record in which some indirect contradiction of such positive testimony could not be found.

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[1] It is essential to notice something which seems to have been altogether ignored below, and that is that in reality there were two separate cases tried in this one proceeding. One was plaintiff's claim for liquid whole eggs delivered between May 7th and 13th. The other was defendant's counterclaim for damages for delivery of adulterated eggs between March 24th and May 5th.

There was not a word of contradiction, direct or indirect, of defendant's proof by disinterested witnesses that the deliveries of May 7th to 13th were bad. There was so-called indirect contradiction of the resulting inference that the deliveries between March 24th and May 5th were bad. This the Court below has held to be indirect contradiction of defendant's proof concerning the May 7th to 13th deliveries. Of course it was not even indirect contradiction, but assuming that it was, that cannot be said to be enough to sustain the plaintiff's burden of proof. The law of the State of New York is clear that plaintiff must prove delivery of what was warranted before recovery of the purchase price may be had.

Certainly the present case cannot be distinguished on that ground from *Pennsylvania R. R. Co.* v. *Chamberlain*, 288 U. S. 333, for in that case there was also indirect contradiction. Yet this Court held that such contradiction, by inference only, was not sufficient to create a question for the jury. Apparently the Court below has failed to apprehend the full effect of, and has refused to follow, the *Chamberlain* decision, while the respondent seeks to justify the result below by reference to direct contradictions, which the Court below could not find, and which, indeed, are not there to be found.

Respondent's Point III

The respondent, quoting from the opinion below, reiterates the justification for admitting the demonstration of a mixture of nulomoline and liquid eggs, that it was merely used to show that a sugar product would change the color.

Were that literally correct, the demonstration would still have been improper and grossly prejudicial, for the reason that the amount of sugar (nulomoline) added to the eggs was admittedly at least three to four times as great as the amount used as an adulterant in the eggs in suit (R. 220, 222). The fact is, however, as the record shows, that the demonstration was offered to show that *levulose* would change the normal color and appearance of liquid eggs (R. 218). There was specific objection on the ground that the Government chemists had testified flatly that no sugar of the class to which levulose belongs was present in the adulterated eggs received from the respondent (R. 219; cf. R. 190-191). It was taken by the Trial Court subject to connection, although counsel for the respondent refused to state that he intended to prove the presence of levulose in the egg powder (R. 218).

The witness who conducted the demonstration was the same chemist whose opinion, that the adulteration found in

the egg powder could not have taken place before dehydration, is offered as indirect contradiction of the testimony of the Government chemists. The demonstration, much more powerful in its effect upon a jury of laymen than any amount of technical testimony, inevitably gave the impression of confirming an opinion which in fact it could not at all confirm.

Therein, in all probability, lies the explanation of this verdict. A verdict for a plaintiff ought not to be sustained simply because there was indirect contradiction of the defendant's proof in support of a counterclaim. The plaintiff has the burden of proof. It cannot reasonably be allowed to rest its recovery upon secondary inference of a fact, the existence of which is negatived by positive and otherwise uncontradicted proof. Not only did the Circuit Court of Appeals fail to follow the *Chamberlain* case, but it had to stretch to find an inference that there was contradiction of petitioner's proof, when in fact there was none.

This case presents the question whether a trial court may abdicate its duty to direct a verdict when such a direction is required by the facts.

Respectfully submitted,

J. Bertram Wegman,
Counsel for Petitioner.